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No. 04-1329

IN THE

Supreme Court of the United States

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,

Petitioners,

v.

INDEPENDENT INK, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR THE MOTION PICTURE ASS'N OF AMERICA, INC., THE ASS'N OF AMERICAN PUBLISHERS, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., THE BUSINESS SOFTWARE ALLIANCE, THE ENTERTAINMENT SOFTWARE ASS'N, THE INDEPENDENT FILM & TELEVISION ALLIANCE, THE NATIONAL FOOTBALL LEAGUE, AND THE RECORDING INDUSTRY ASS'N OF AMERICA, INC. AS AMICI CURIAE SUPPORTING REVERSAL

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to this Court's Rule 37.3, the Motion Picture Association of America, Inc., the Association of American Publishers, the American Society of Media Photographers, Inc., the Business Software Alliance, the Entertainment Software Association, the Independent Film & Television Alliance, the National Football League, and the Recording Industry Association of America, Inc. (collectively, "*Amici*") hereby respectfully move for leave to file the attached *amici curiae* brief supporting reversal of the Federal Circuit's judgment in this case. The consent of counsel of record for the petitioner has been obtained. The consent of counsel of record for the ~~petitioner~~ RESPONDENT was requested but no response has yet been received.

The interest of *Amici* in this case arises from their ownership of a significant number of copyrights, patents, and other forms of intellectual property. *Amici* are in a position to provide the Court with a broader perspective as to the propriety, and the economic and other implications, of the ruling of the Federal Circuit below that "the Supreme Court cases in this area squarely establish that patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power. Rather, . . . the necessary market power to establish a section 1 violation is presumed." 396 F.3d 1342, 1348-49 (Fed. Cir. 2005).

QUESTION PRESENTED

Whether, in an action under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that the defendant engaged in unlawful tying by conditioning a patent license on the licensee's purchase of a non-patented good, the plaintiff must prove as part of its affirmative case that the defendant possessed market power in the relevant market for the tying product, or market power instead is presumed based solely on the existence of the patent on the tying product.

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BRIEF FOR THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE ASSOCIATION OF AMERICAN PUBLISHERS, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., THE BUSINESS SOFTWARE ALLIANCE, THE ENTERTAINMENT SOFTWARE ASSOCIATION, THE INDEPENDENT FILM & TELEVISION ALLIANCE, THE NATIONAL FOOTBALL LEAGUE, AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

INTEREST OF AMICI CURIAE[1]

The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA's members produce and distribute copyrighted entertainment for theatrical, television and home video/DVD viewing, and own many patents related to methods utilized in creating or delivering such products.

The Association of American Publishers ("AAP") is the principal trade association for the U.S. book publishing industry with over 300 members, comprising most of the major commercial book publishers in the United States, as well as smaller and medium-sized houses, non-profit publishers, university presses and scholarly societies. The

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[1] Pursuant to this Court's Rule 37.6, *amici* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

AAP's members and affiliates own a substantial number of copyrights.

The American Society of Media Photographers, Inc. (ASMP) is a §501(c)(6) not-for-profit trade association. ASMP was established in 1944 and is the world's largest association whose primary mission is to protect and promote the interests of professional photographers who earn their livings by making copyrighted photographs intended for publication in the various media.

The Business Software Alliance is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Dell, Entrust, HP, IBM, Intel, Internet Security Systems, Macromedia, McAfee, Microsoft, PTC, RSA Security, SAP, SolidWorks, Sybase, Symantec, The MathWorks, UGS and VERITAS Software.

The Entertainment Software Association ("ESA") is the U.S. trade association dedicated to serving the business and public affairs needs of companies that publish copyrighted video games for game consoles, personal computers, handheld devices, and the Internet. The ESA works to protect the intellectual property interests of its members through, among other things, a worldwide anti-piracy program designed to combat piracy of entertainment software. ESA members collectively account for more than 90 percent of the $7 billion in entertainment software sales in the United States in 2003,

and billions more in export sales of American-made entertainment software.

The Independent Film & Television Alliance (IFTA) is the trade association representing over 150 independent producers and distributors of copyrighted motion pictures and television programming, as well as affiliated financial institutions that provide funding for independent production. IFTA is also the owner of the American Film Market, the largest commercial film market in the world.

The National Football League is an unincorporated association of thirty-two Member Clubs, each of which owns and operates a professional football team. The NFL is responsible for the production of and/or owns the copyright in various audio and video products that are marketed to the public.

The Recording Industry Association of America, Inc. ("RIAA") is a nonprofit trade group that represents the United States sound recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. RIAA members create, manufacture and/or distribute copyrighted sound recordings that are sold throughout the United States.

The interest of *Amici* in this case arises from their ownership of a significant number of copyrights, patents, and other forms of intellectual property ("IP"). *Amici*, as a diverse group of IP owners, are in a position to provide the Court with a broader perspective as to the propriety, and the economic and other implications, of the ruling of the Federal Circuit below that "the Supreme Court cases in this area squarely establish that patent and copyright tying, unlike other tying cases, do not require an affirmative demonstration of market power. Rather, . . . the necessary market power to establish a section 1 violation is presumed." 396 F.3d 1342, 1348-49 (Fed. Cir. 2005).

STATEMENT

Amici adopt the Statement of the Case presented by the Petitioner.

SUMMARY OF ARGUMENT

This Court should decline to presume that antitrust market power arises from the mere ownership of intellectual property rights, whether patents or copyrights. Although such a presumption was articulated in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the *Loew's* "presumption" is not grounded in this Court's earlier precedents or its modern market power jurisprudence. Moreover, the *Loew's* presumption clashes with this Court's teaching that antitrust presumptions should reflect market realities and sound economic reasoning. Accordingly, the Court should abandon the *Loew's* presumption for patents, and, as well, for copyrights and other intellectual property.

ARGUMENT

I. THIS COURT'S PRECEDENTS DO NOT SUPPORT PRESUMING THE EXISTENCE OF ANTITRUST MARKET POWER FROM PATENT OR COPYRIGHT OWNERSHIP

The Federal Circuit averred below that "the Supreme Court has held that there is a presumption of market power in patent tying cases, and we are obliged to follow the Supreme Court's direction," despite "heavy criticism" and although "[t]he time may have come to abandon the doctrine." 396 F.3d at 1348-51. A presumption of market power based upon mere patent (or copyright) ownership, however, does *not* "find support in [this Court's] prior cases." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 37-38 (1984) (O'Connor, J., concurring in

judgment, with Burger, C.J., Powell, Rehnquist, J.J.) (citations omitted). This Court "has never adopted a general presumption that any kind of IP right, including patents, confers significant power." HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 4.2e1 (2005 Supp.). While declarations on this subject appear in a number of the Court's opinions, they spring from a narrow patent law doctrine, do not engage with antitrust concerns, and do not supply the pivot on which any of the Court's prior antitrust decisions has turned. As such, this Court is free to (and should) disapprove the market power presumption at issue here. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759-61, 777 (1984) (rejecting intra-enterprise conspiracy doctrine; "The doctrine derives from declarations in several of this Court's opinions. In no case has the Court considered the merits of the . . . doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.").

A. Although *Loew's* Speaks Of A "Presumption," No Settled Rule of Presuming Antitrust Market Power From Intellectual Property Ownership Emerges From Either That Case Or The Precedent On Which It Rests.

In *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962), this Court stated that the "requisite economic power" in a tying case "is presumed when the tying product is patented or copyrighted." *Loew's* deemed this presumption to be an antitrust "principle" that "grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent." *Id.* at 46. This *patent tying* doctrine, however, has no roots in *antitrust* law or

concepts; its teachings regarding the scope of the "limited monopoly"[2] granted under the Patent Act simply do not define the economic circumstances when patents bestow monopoly or market power for purposes of the Sherman and Clayton Acts. And what is true of patents here is overwhelmingly the case for copyrights, which confer even more limited rights. *See infra,* at Section II.B. Thus, if *Loew's* is correct that the patent tying doctrine was transformed into a "principle" of presuming market power generally from intellectual property ownership — *Loew's* implies that the transformation occurred in *International Salt*, 332 U.S. 392 (1947), and *Paramount Pictures*, 334 U.S. 131 (1948), *see* 371 U.S. at 44-46 — it was a presumption ungrounded in antitrust jurisprudence. It was also unnecessary to the result in *Loew's* itself and in most if not all of the Court's prior antitrust cases.

1. The earliest patent tying case cited in *Loew's, Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917), was a patent-infringement suit in which the Court declined to find that plaintiff's patent on a film-projector machine had been infringed by defendants' refusal to use plaintiff's films, as required by the patent license agreement. *See id.* at 517-19. In recognizing this misuse defense to a claim of patent infringement, the Court had no occasion, nor did it purport, to rely on the antitrust laws. Rather, it simply defined the statutory scope of the patent grant, and reasoned that enforcing the license restriction at issue would allow the plaintiff, "under color of its patent, . . . to . . . derive its profit, not from *the invention on which the law gives it a monopoly* but from the unpatented supplies with which it

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[2] The Court's usage of the term "limited monopoly" to describe the rights conferred by a patent grant predates passage of the Sherman Act. *See Butterworth v. United States,* 112 U.S. 50, 58-59 (1884).

is used, and which are wholly without the scope of the *patent monopoly*." *Id.* at 517 (emphasis added).

Similarly, in *Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27 (1931), another patent tying decision cited in *Loew's*, the Court dealt with "the limited scope of the *patent monopoly*," *id.* at 31 (citation omitted), and held that a patent owner "may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor; and if it does so, relief against one who supplies such unpatented materials will be denied." *Id.* In *Carbice*, as in *Motion Picture Patents*, the only question before the Court was whether a defense to a claim of patent infringement should be recognized — whether courts should "deny relief against those who disregard the limitations sought to be imposed by the patentee beyond the legitimate scope of its monopoly." *Id.* at 32-33 & n.3 (noting that "[t]he patent grant is inherently limited").[3]

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[3] The *Carbice* Court briefly stated that the "present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law, in *Standard Sanitary Mfg. Co. v. United States,* 226 U.S. 20 [(1920)]." *Carbice*, 283 U.S. at 34. *Standard Sanitary,* however, was a case condemning a cartel organized through sham patent licensing, holding merely that "[t]he added element of the patent in the case at bar cannot confer immunity." 226 U.S. at 48-49. *Carbice* suggested (in a footnote) that "[i]n such cases, the attempt to use the patent unreasonably to restrain commerce is not only beyond the scope of the grant, but also a direct violation of the Anti-Trust Acts." 283 U.S. at 34 n.4. For support, the Court cited, *inter alia, United Shoe Mach. Co. v. United States,* 258 U.S. 451 (1922), a Clayton Act §3 case involving patent tying where the Court did *not* presume market power from patent ownership. *See infra,* at Section I.B.

The *Loew's* Court also relied on *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942), a decision that makes unmistakably clear the patent tying doctrine's lack of tethering to antitrust principles. In *Morton Salt*, the Court applied the doctrine in a patent case despite the fact that the Seventh Circuit below had required proof of tying under *antitrust* standards and despite the fact that "it did not appear that the use of [the] patent substantially lessened competition or tended to create a monopoly." *Id.* at 490 ("[T]he present suit is for infringement of a patent. The question we must decide is not necessarily whether respondent has violated the Clayton Act . . . ."); *see also id.* at 494 ("It is unnecessary to decide whether respondent has violated the Clayton Act . . . ."). Thus, by the late 1940s, the patent tying doctrine that had emerged from the "long line" of patent cases cited in *Loew's* was entirely divorced from antitrust principles and concepts (other than shared usage of the word "monopoly").[4]

2. Certainly, the two 1940s antitrust decisions on which *Loew's* principally rests, *International Salt*, 332 U.S. 392 (1947), and *Paramount Pictures*, 334 U.S. 131 (1948), contain no express reference to any IP-based market power

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4 This conclusion is not shaken by any of the three other decisions (in addition to *Motion Picture Patents*, *Carbice* and *Morton Salt*) from the "long line" of patent tying cases. *See Loew's*, 371 U.S. at 46. *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938), was a patent case with no discussion of antitrust concepts. *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940), although an antitrust case, involved not tying but vertical price fixing by a patent licensor and made only brief reference to the patent tying doctrine in the course of rejecting any notion that the price fixing at issue was immunized by patent ownership. *Id.* at 455-56. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944), was a patent case involving only incidental procedural questions about an antitrust counterclaim.

"presumption" (the word is absent from both cases) and, even more significantly, provide no sound *antitrust* basis for any such presumption. Nor is it apparent that the outcome in either case hinged on an implicit presumption of market power, whether justified or not.

First, it is far from clear that *International Salt* even relied on the existence of a patent to presume or infer market power. The decision contains no discussion of market power as such, no invocation of the patent tying doctrine,[5] and only a single reference to the "limited monopoly" that "appellant's patents confer" ("to restrain others from making, vending or using the patented machines"). 332 U.S. at 395. The Court did state that defendant's "patents afford no *immunity* from the anti-trust laws," *id.* at 396 (emphasis added), but a presumption of market power does not follow from this premise.[6] Indeed, as discussed *infra*, at Section I.B, in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 9 (1958), it was said that "[i]n arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case."

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5 "The 'patent misuse' doctrine may have influenced the Court's willingness to strike down the arrangement at issue in *International Salt* . . ., although the Court did not cite the doctrine in that case." *Jefferson Parish*, 466 U.S. at 37-38 n.7 (O'Connor, J., concurring in judgment).

6 In the next paragraph, the Court explained that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious," 332 U.S. at 396, but if it was patent ownership that made this "tendency . . . seem[] obvious," the Court did not say so explicitly.

If an antitrust presumption of market power was minted in *International Salt,* it went unremarked in *Paramount,* which in relevant part affirmed the lower court's condemnation of block booking under the antitrust laws. *See Paramount Pictures,* 334 U.S. at 156-59. "[T]he Court [in *Paramount*] did not analyze the arrangement with the schema of the tying cases. Rather, the Court borrowed the patent law principle of 'patent misuse,' which prevents the holder of a patent from using the patent to require his customers to purchase unpatented products." *Jefferson Parish*, 466 U.S. at 37-38 n.7 (O'Connor, J., concurring in judgment). This "borrowing" of *patent* principles for application to an *antitrust* case involving *copyrights* occurred without any antitrust analysis at all, much less any exploration of the differences and variations between copyright and patent rights as a matter of IP law.[7] In any event, a market power presumption need not be read into *Paramount* to uphold the Court's condemnation there of block booking given the absence of any indication in the opinion of any challenge to the existence of market power.[8]

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[7] *Paramount* merely accepted the patent-copyright analogy uncritically, asserting that "the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." 334 U.S. at 158. Its only independent analysis of copyright law, in a footnote, declares that "[t]he exclusive right granted by the Copyright Act . . . includes no such privilege." *Id.* at 158 n.12. None of the other decisions cited in *Loew's* as authority for the patent tying principle contains *any* discussion of copyrights save for a passing reference in two sentences (both *dicta*) in *Morton Salt,* 314 U.S. at 494.

[8] Nor is there any indication that the defendants disputed the existence of market power in the District Court. *See United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 348-52 (S.D.N.Y.

[Footnote continued on next page]

3. Finally, independent of its attempted reliance on precedent, *Loew's* provided no real explanation or analytic support justifying a market power presumption on grounds of either economic reality or antitrust policy. True, the "[patent tying] cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products," *Loew's,* 371 U.S. at 46, but *Loew's* offered no reason to think that this extension of control would always or virtually always lessen competition or tend to create an antitrust monopoly. The decision never explained why "the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences." *Id.* (citing *International Salt*, 332 U.S. 392, and *Paramount Pictures*, 334 U.S. at 156-59).

Of course, while *Loew's* denied that the defendants there could "escape the applicability of *Paramount Pictures,*" 371 U.S. at 48, it was at pains to hold that the record below contained factual findings of "sufficient economic power" serving to "*confirm* the presumption of uniqueness resulting from the existence of the copyright itself." *Id.* (emphasis added). Moreover, the Court found "there can be no question in this case of the adverse effects on free competition resulting from appellants' illegal block booking contracts." *Id.* at 48-49. Thus, a presumption of market power was not strictly necessary to the Court's decision in that case.[9] In short, what the Court said of

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[Footnote continued from previous page]

1946); *see also United States v. Paramount Pictures, Inc.*, 70 F. Supp. 53 (S.D.N.Y. 1946).

[9] This is not to contend that the record in *Loew's* would necessarily compel a finding of market power under the Court's modern framework of analysis. *See infra,* at Section I.C.

another flawed antitrust "rule" is true as well of the *Loew's* presumption: "while this Court has previously seemed to acquiesce in the . . . doctrine, it has never explored or analyzed in detail the justifications for such a rule; [and] the doctrine has played only a relatively minor role in the Court's Sherman Act holdings." *Copperweld*, 467 U.S. at 766.

B. The *Loew's* "Presumption" Was A Departure From Earlier Precedent Requiring Some Showing of Actual Market Power.

Insofar as it presumed the existence of market power from the mere ownership of a copyright or patent, *Loew's* parted ways with earlier antitrust precedents of this Court.

1. Even though *Loew's* cited the Court's earlier decision in *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958), and purported to follow its teaching that "[t]he standard of illegality is that the seller must have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product,'" *Loew's*, 371 U.S. at 45 (quoting *Northern Pacific*, 356 U.S. at 6), its market-power presumption cannot be reconciled with *Northern Pacific*'s analytical framework or its reading of prior precedent. *Northern Pacific* held that "where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most." 356 U.S. at 6. But the mere fact that the seller owns a copyright or patent does not, without more, mean that the seller has "control or dominance," or even "sufficient economic power," over the tying product. *See infra*, at Sections I.C and II. *Northern Pacific* recognized as much itself, when it interpreted its prior decision in *International Salt* as follows:

> In arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful despite the fact that the tying item was patented, not because of it.
>
> . . .
>
> Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight.

356 U.S. at 9-10 & n.8 (emphases added).

2. Moreover, in even earlier antitrust cases, the Court invoked no presumption of market power based on intellectual property ownership but relied on economic evidence of the defendants' market power over the tying product in condemning the tying arrangements at issue. *See United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 455 (1922) (defendant "occupies a dominant position" in its market, with "a very large percentage of such machinery"); *International Business Machines Corp. v. United States*, 298 U.S. 131, 133, 136 (1936) (defendant IBM, with stated market share of 81%, was one of only two firms left in market). Notably, the Court attached no significance in these cases to the fact that the tying products were patented. *See, e.g.*, *International Business Machines*, 298 U.S. at 138 (noting that "the lawfulness of the tying clause must be ascertained by applying to it the standards prescribed by [Clayton Act section] 3 as though the leased article and its parts were unpatented"); HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2e2 ("[A] significant point of the [*United Shoe Machinery*] case is

that the Court did *not* draw its inferences of power from patent ownership, but rather from the defendant's dominant position in the market for machinery of the type it made.") (emphasis in original).

C. The *Loew's* Presumption Has No Place In This Court's Modern Approach to Market Power.

While the Court has made reference to the *Loew's* presumption in two of its subsequent cases, it has never applied it to date.[10] Far from relying on presumptions, the Court's decisions postdating *Loew's* have made clear that the modern approach to market power analysis focuses fundamentally on the critical question of the defendant's power over price and output in the relevant market.

1. As early as *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*"), this Court explicitly recognized that "[m]arket power is usually stated to be the ability of a single seller to raise price and restrict output." *Id.* at 503. Subsequently, in *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977) ("*Fortner II*"), the Court clarified that its prior precedents "focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.* at 620 (footnote omitted); *see also Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 (7th Cir. 1985) (*Fortner II* "held that as a matter of law factual uniqueness was not enough . . . to establish market power") (Easterbrook, J.).

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10 *See United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 619 (1977) (*dicta*); *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) (*dicta*).

2. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the Court explained that "we have condemned tying arrangements when the seller has some special ability . . . usually called 'market power.'" *Id.* at 13-14.[11] The possession and misuse of such power supplies "the essential characteristic of an invalid tying arrangement," which "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 12. The Court explained that *per se* condemnation is inappropriate when "the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product." *Id.* at 17-18. Thus, "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." *Id.* at 18. Applying this framework, the Court proceeded to reject the plaintiff's *per se* tying claim, holding that a mere "preference" of some consumers in the relevant market for the tying product was insufficient to establish market power when 70% turned to other alternatives. *Id.* at 26-29.

As the four-Justice concurrence in *Jefferson Parish* noted, this analytical framework was inconsistent with any IP-based presumption of market power:

> A common misconception has been that a patent or copyright, a high market share, or a unique product

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11 The Court explained that: "As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market." *Jefferson Parish*, 466 U.S. at 27 n.46; *accord NCAA v. Board of Regents*, 468 U.S. 85, 108 n.38 (1984) ("Market power is the ability to raise prices above those that would be charged in a competitive market.").

> that competitors are not able to offer suffice to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.

466 U.S. at 37-38 n.7 (O'Connor, J., concurring in judgment, with Burger, C.J., Powell, Rehnquist, J.J.). [12]

3. Finally, in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), this Court reaffirmed that a "necessary feature of an illegal tying arrangement" is proof of "appreciable economic power in the tying market." *Id.* at 464. The Court made clear that such a showing requires proof of market power — "the power 'to force a purchaser to do something that he would not do in a competitive market'" — which the Court again "defined as 'the ability of a single seller to raise price and restrict output.'" *Id.* As discussed further *infra*, at Section II.A,

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12 While IP rights were not at issue in *Jefferson Parish*, the majority had stated in *dicta* that "if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that *the inability to buy the [defendant's] product elsewhere* gives the seller market power." *Id.* at 16 (emphasis added). This observation was in obvious tension with the majority opinion's actual *holding* that the ability of customers in the relevant market to buy the defendant's *competitors'* products elsewhere was sufficient to defeat any claim of market power. Indeed, one year later, two members of the *Jefferson Parish* majority indicated their desire to revisit the question of "what effect should be given to the existence of a copyright or other legal monopoly in determining market power." *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908, 909 (1985) (White, J., dissenting from denial of *certiorari*, along with Blackmun, J.).

the *Kodak* Court affirmed that "[i]n determining the existence of market power, . . . this Court has examined closely the *economic reality* of the market at issue." *Id.* at 466-67 (emphasis added) (footnote omitted). [13]

4. The modern antitrust analysis of market power thus requires inquiry into the relevant market and the defendant's economic power in that market. Defining the relevant market involves identifying those "products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 404 (1956). The existence of market power is normally inferred from the defendant's possession of a predominant share of the relevant market, in conjunction with evidence of high barriers to entry, little excess capacity held by rivals, and a lack of buyer power. *See, e.g., Kodak*, 504 U.S. at 464; 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 233-46 (5th ed. 2002). Accordingly, "the relevant question is not whether a single intellectual property right standing alone confers power, but rather whether power can be inferred from the antitrust defendant's entire market position. This position includes significant intellectual property rights in addition to other facts concerning the firm itself and the market in which it operates. These factors embrace the range of substitutes for the defendant's good, which may

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13 In rejecting an argument for immunity based on "inherent monopoly," the Court noted that it had "held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" *Id.* at 479 n.29 (quoting *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953)). The Court neither cited *Loew's* nor addressed whether intellectual property was presumed to confer such a "dominant position."

be quite large notwithstanding the patent or copyright; barriers to entry; excess capacity held by rivals; sophistication of buyers; and others. In sum, the presence of intellectual property rights may sometimes be an important factor in assessing a firm's market power, but just as often it will be relatively unimportant." *See* HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2c.

II. A PRESUMPTION OF MARKET POWER BASED SOLELY ON OWNERSHIP OF INTELLECTUAL PROPERTY FINDS NO SUPPORT IN MODERN ECONOMIC THEORY OR ACTUAL MARKET EXPERIENCE

This Court's own decisions regarding inferences and presumptions in antitrust cases lay bare the true nature of the *Loew's* presumption as nothing more than a "[l]egal presumption that rest[s] on formalistic distinctions rather than actual market realities." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (footnote and citations omitted). The presumption does not purport to be, nor can it be, grounded in economics, logic or experience.

A. The *Loew's* Presumption Conflicts With This Court's Consistent Requirement That Antitrust Presumptions Be Reliably Anchored In Market Realities And Sound Economic Reasoning.

This Court has repeatedly rejected presumptions that lack logical and empirical validation — so that there is no assurance that the presumed fact is always or at least reliably a correct characterization of the real world — as a basis for resolving modern antitrust cases. *See, e.g., Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 775 & n.12, 779-81 (1999) (stating "assumption alone will not do"; truncated antitrust analysis is proper only when "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" shows that "the experience

of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow"); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (rejecting Ninth Circuit rule that permitted inferences of specific intent and dangerous probability to be drawn solely from proof of defendant's conduct in attempted monopolization cases "without any proof . . . of a realistic probability that the defendant could achieve monopoly power"); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) ("departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing"). As this Court has emphasized: "'Realities must dominate the judgment. . . The Anti-Trust Act aims at substance.'" *Cont'l T.V.*, 433 U.S. at 46-47.

This aversion to legal fictions in antitrust cases simply cannot be reconciled with the *Loew's* market power presumption. No decision makes this point more clear than *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), a tying case in which the defendant urged the adoption of a "legal presumption against a finding of market power" in aftermarket cases when such power is lacking in the associated original equipment market. *Id.* at 466-67. In addressing this argument, the Court explained that:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' In determining the existence of market power, and specifically the 'responsiveness of the sales of one product to price changes of the other,' this Court has examined closely the economic reality of the market at issue.

Id. at 466-67 (footnote and citations omitted, including, *inter alia*, citation to *Jefferson Parish*, 466 U.S. at 37

(O'Connor, J., concurring in judgment)). After analyzing extensively the "factual assumptions underlying [the] proposed rule," the Court found "no immutable physical law — no 'basic economic reality' — insisting that competition in the equipment market cannot coexist with market power in the aftermarkets" and concluded that the proposed presumption did not necessarily "describe actual market behavior . . . accurately." *Id.* at 469-78. Hence, the Court rejected the presumption.

By contrast, in *Loew's* and its antecedents, the Court never even purported to have examined closely the economic reality of the intellectual property markets at issue or otherwise to have put to the test the factual assumptions and economic reasoning underlying the *Loew's* presumption.[14] Instead, "formalistic distinctions" imported from patent doctrine provided the presumption's principal (if not sole) support. In any event, as discussed below, there is no immutable economic law, no basic market reality and no proven regularity of commercial experience validating the *Loew's* presumption.

B. Presuming The Existence of Market Power From the Mere Existence of A Copyright or Patent Makes No Economic Sense And Finds No Empirical Support.

There is simply no rational basis, whether in logic, economic theory, or empirical experience, for a presumption of market power based solely on intellectual property ownership.

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[14] Further, there has never been any showing that the presumption serves to deter conduct that always or almost always injures competition, which is what would be required "to warrant a legal presumption without any evidence of its actual economic impact." *Kodak*, 504 U.S. at 479; *see also Cont'l T.V.*, 433 U.S. at 50 n.16.

1. No substantive basis of any sort is provided for the *Loew's* presumption by the fact that commentators and courts (including this Court) have spoken of patents and copyrights as conferring "monopolies." While this terminology may be conventional in the intellectual property context, "this use of the term 'monopoly' would be incorrect for economic analysis generally or antitrust analysis in particular." HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2a; *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 374 (2003) ("Talk of patent and copyright 'monopolies' is conventional. . . . The usage is harmless as long as it is understood to be different from how the same word is used in antitrust analysis."); ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT § 1.4(b), at 21 (5th ed. 2001) ("Patent rights are not legal monopolies in the antitrust sense of the word. Not every patent is a monopoly, and not every patent confers market power."). This is so for several reasons.

First, while the patent and copyright laws confer legal "rights to exclude," the possession of such rights is hardly unique to intellectual property owners. Owners of tangible property also possess rights to exclude. "One does not say that the owner of a parcel of land has a monopoly because he has the right to exclude others from using the land. But a patent or copyright is a monopoly in the same sense. It excludes people from using some piece of intellectual property without consent. That in itself has no antitrust significance." *Id.*; *see also, e.g.*, HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2a ("The intellectual property laws do not purport to confer any monopoly . . . but only the right to exclude others from producing the good, expression or symbol covered by the intellectual property interest. This right is a property right that is not different in principle from other property rights."). Second, to equate antitrust and IP "monopolies" would be to confuse the legal "power to exclude" under intellectual property law with the economic "power over price and output" that is the

hallmark of market and monopoly power in the antitrust sense. *See* Section I.C, *supra*. These are related but far from identical concepts.

Similar objections would apply to any effort to justify the *Loew's* presumption on the basis that grants of IP "monopolies" impart or imply "uniqueness" or "distinctiveness." That is to say, these qualities may also characterize tangible property (without giving rise to an inference of market power) and in any event are not logically equivalent to power over price and output. Even more fundamentally, the possession of an IP right does not necessarily imply that the covered product is (meaningfully) unique or distinctive in the first place.[15] While the *Loew's* opinion used these terms, it identified no connection between a film's copyright and its uniqueness, distinctiveness or desirability.[16] In fact, no such

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[15] The "originality" threshold for a copyright "is very low, requiring only evidence of independent creation and some minimal level of creativity. The work need not be novel or distinctive." HOVENKAMP, JANIS & LEMLEY, *supra*, § 2.3b2 (footnotes omitted). The "novelty" requirement in patent law is generally "satisfied as long as the patent applicant was the first to invent the claimed invention." ROGER D. BLAIR & THOMAS F. COTTER, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES 8 (2005).

[16] *Loew's* acknowledged both the "presence of competing substitutes for the tying product" and "the fact of competition" between the tied and foreclosed films — even though all these films were copyrighted. 371 U.S. at 49. The opinion professed to find such competition "insufficient to destroy the legal, and indeed the economic, distinctiveness of the copyrighted product," *id.* at 49, but provided no explanation for this conclusion, citing only *dicta* in *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 307 (1949), and *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 & n.30 (1953), to the effect that "[a] patent, . . .
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connection necessarily exists. "[T]he thing that makes [a tying film] highly desirable is hardly its copyright; after all, both [the tying] and [the tied films] are copyrighted. ... And the existence of the copyright could not change the status of [a tied film] from undesirable to desirable." HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2e3.

2. Any effort to equate IP "monopolies" with antitrust market power is not just simplistic, but also heedless of significant differences and variations among types of IP (as a matter of intellectual property law) that may be highly relevant for antitrust purposes. In particular, the indiscriminate branding of IP rights as "monopolies" disguises the fact that copyrights confer a more limited bundle of rights than do patents. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003) ("[D]istinguishing the two kinds of intellectual property, copyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading. The grant of a patent, on the other hand, does prevent full use by others of the inventor's knowledge.") (citations omitted); U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property § 1.0 (1995) ("Unlike a patent, which protects an invention not only from copying but also from independent creation, a copyright does not preclude others from independently creating similar expression."); BLAIR & COTTER, *supra*, at 28-29 ("the rights of a copyright owner remain somewhat less expansive than the corresponding patent owner's rights"); HOVENKAMP, JANIS & LEMLEY, *supra*, § 2.3a ("Copyrights are subject to a variety of defenses and limitations (e.g., fair use, compulsory

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although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of" "market control of the tying device."

licensing) having no analog in patent law."); HAL R. VARIAN, JOSEPH FARRELL & CARL SHAPIRO, THE ECONOMICS OF INFORMATION TECHNOLOGY: AN INTRODUCTION 54-55 (2004) ("Compared with patents . . . copyrights are 'narrow' in the sense that they do not prevent others from creating or distributing similar works: the copyright on one movie does not prevent others from making movies with similar themes or plot lines."). It also obscures the fact that copyrights can be easier and less costly to create. *See, e.g.*, HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2d ("The cost of obtaining a copyright is nominal and within the reach of even amateur poets and graduate students producing theses or dissertations."); IIA PHILLIP E. AREEDA, HERBERT HOVENKAMP, & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 518b2, at 143 (2d ed. 2004) ("While the patent application process is relatively costly and requires a showing that something is new, useful, and nonobvious, virtually any novel expression can be copyrighted upon the payment of a nominal fee."). All of these limiting factors are highly relevant to the *economic* question of whether market power may be inferred from mere copyright possession.

3. In any event, whether applied to copyrights or patents, the *Loew's* presumption is thoroughly unsound as a matter of substantive antitrust economics. For the mere possession of an IP right to give rise to an inference of market power that is "reasonable" and that "makes economic sense" (*Kodak*, 504 U.S. at 468-69), such ownership must satisfy the elements of proof for antitrust market power. That is, such ownership in and of itself (1) either must rule out any interchangeable (substitute) products entirely or must permit only minor substitutes accounting for a small (non-predominant) market share; and (2) must be inconsistent with low barriers to entry and any and all other factors that serve to prevent market power. *See supra*, at Section I.C.

There is, however, no immutable economic law or other basis in modern economic theory for thinking that either of these propositions is *necessarily* true, given that the intellectual property laws do not forbid competition by non-infringing products, or otherwise guarantee the existence of high entry barriers and other market features conducive to market power. For example, "a patent holder has no market power in any relevant sense if there are close substitutes for the patented product," *Jefferson Parish*, 466 U.S. at 37-38 n.7 (O'Connor, J., concurring in judgment), and it is undeniable that "there will often be sufficient actual or potential close substitutes for [a] product, process or work [covered by an IP right] to prevent the exercise of market power." U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (1995).[17]

This Court has recognized the force of such considerations by declining to create any presumption of patent-based antitrust monopoly power for purposes of Section 2 of the Sherman Act. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) ("To establish monopolization or attempt . . . under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved.");

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17 *See also, e.g.*, BLAIR & COTTER, *supra*, at 19 ("for most patented inventions . . . there is a range of acceptable, nonpatented substitutes"); HOVENKAMP, JANIS & LEMLEY, *supra*, § 1.3a (a patented product "normally competes for the attention of consumers with many other products, some themselves protected by intellectual property rights"); IIA AREEDA, HOVENKAMP & SOLOW, *supra*, ¶ 518a, at 136 (noting the market power conferred by a patent is limited because rivals can "invent around" the patent to create substitute goods).

United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956) (despite ownership of cellophane patents, defendant could "not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings" shown by the record); HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2e5.

The Federal Circuit below distinguished this authority on formalistic grounds, *see* 396 F.3d at 1349 ("*Walker Process* was a *section 2* case asserting claims of monopolization, not a *section 1* claim for tying") (emphases added), but although "[m]onopoly power under § 2 requires . . . something greater than market power under § 1," *Kodak*, 504 U.S. at 481, the lack of any presumption under Section 2 is *not accounted for* by any finding that patents characteristically confer "the ability . . . to raise price and restrict output" falling just short of the monopolistic level. Rather, the absence of a presumption flows from this Court's recognition that a patented product may "not comprise a relevant market," that "[t]here may be effective substitutes for the device which do not infringe the patent," and that issues like these are "a matter of proof" requiring resort to "economic data." *Walker Process*, 382 U.S. at 177-78. These considerations cannot be reconciled with the *Loew's* presumption.

4. The *Loew's* presumption also comprehensively fails the empirical test of market reality. First, to be valid even as a mere generalization (although this would hardly warrant the creation of a legal presumption under the Court's precedents), the *Loew's* presumption would have to be shown to be true of the majority of patents and copyrights. But in light of the sheer volume of patents and copyrights in existence — easily numbering in the

millions[18] — such a showing would imply a pervasiveness of market power in the American economy of a degree that has never been suggested much less demonstrated.

Second, it is a broadly accepted empirical finding that the vast majority of patented and copyrighted products have no commercial value.[19] An intellectual property

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[18] The U.S. Patent and Trademark Office ("USPTO") receives over 350,000 applications a year and issues nearly 200,000 patents. USPTO, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004 § 6.4.1, Table 1, *available at* http://www.uspto.gov/web/offices/com/annual/2004/060401_table1.html. The "stock" of patents is currently in excess of 6 million. ADAM B. JAFFE & MANUEL TRAJTENBERG, PATENTS, CITATIONS & INNOVATIONS 3 (2002). Copyright registrations by the U.S. Copyright Office exceed 500,000 annually. U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 2004 at 64, *available at* http://www.copyright.gov/reports/annual/2004/appendices.pdf. Given ease of creation and the fact that registration is not required for copyright protection to attach, *see, e.g.*, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:6 (4th ed. 2005), the true volume of copyrights created in a given year (or in total) is unknown but likely to be a multiple of the number of registrations.

[19] *See, e.g.*, BLAIR & COTTER, *supra*, at 19 ("a majority of patents are never commercialized at all, much less meet with competitive success"); HOVENKAMP, JANIS & LEMLEY, *supra*, §§ 1.3a, 4.2a ("the vast majority of patented products and processes are commercial failures"; "Many patented inventions are never brought to market, and many published books never get beyond their first printing."); IIA AREEDA, HOVENKAMP & SOLOW, *supra*, ¶ 518a, at 138 ("To obtain a patent, the applicant must show an invention is new, useful, and nonobvious. . . . [S]atisfying these three requirements does not mean that the resulting patent can be marketed at all. Most patents have no commercial value."); JAFFE & TRAJTENBERG, *supra* note 18, at 27

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right that has little or no value *a fortiori* lacks market power. For example, only 5 percent (or fewer) of patents are ever licensed or enforced by litigation. *See* LANDES & POSNER, *supra*, at 320 n.52 (citing Samson Vermont, *The Economics of Patent Litigation*, *in* FROM IDEAS TO ASSETS: INVESTING WISELY, IN INTELLECTUAL PROPERTY 327, 332 (Bruce Berman ed. 2002)); Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. REV. 1495, 1507 & n.55 (2001). From half to two-thirds of issued patents actually lapse for failure to pay maintenance fees (amounting at most to a few thousand dollars) before the end of their term. *Id.* at 1503 & n.34. Similarly, copyright renewal data (from the period prior to the advent of automatic renewal in 1992) demonstrate that about 80% of copyrights were never renewed (despite small costs of doing so). LANDES & POSNER, *supra*, at 237-38. Of course, to observe that most IP rights have little or no value is not to contend that IP rights *never* confer market power. "A small percentage of copyrights or patents do in fact claim so much success that their owners acquire significant market power from them, but given the small number this fact can hardly be presumed." HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2a.

5. Given that a presumption of market power based on mere IP ownership lacks any rational support, the virtual unanimity of antitrust scholars in rejecting such a presumption is unsurprising. "Putting it bluntly, to presume market power in a product simply because it is protected by intellectual property is nonsense." HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF

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(2002) ("there is substantial evidence to the effect that the distribution of patent values is highly skewed toward the low end, with a long and thin tail into the high-value side"); SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 275-79 (2004) (summarizing findings of empirical research).

COMPETITION AND ITS PRACTICE 142 (1999). *See also, e.g.*, HOVENKAMP, JANIS & LEMLEY, *supra*, §§ 4.2-4.3; LANDES & POSNER, *supra*, at 373-74; IIA AREEDA, HOVENKAMP, & SOLOW, *supra*, ¶ 518a, at 136-37; X PHILLIP E. AREEDA, HERBERT HOVENKAMP & EINER ELHAUGE, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1737a, at 79 (2004); *Id.* ¶ 1737d, at 83; RICHARD A. POSNER, ANTITRUST LAW 197-98 (2d ed. 2001); William Montgomery, Note, *The Presumption of Economic Power for Patented and Copyright Products in Tying Arrangements*, 85 COLUM. L. REV. 1140, 1149-52 (1985); ROBERT H. BORK, THE ANTITRUST PARADOX 365-68 (1978).

Even more notable is the position adopted by the agencies most directly responsible for enforcing U.S. antitrust policy — the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). In 1995, the DOJ and FTC jointly issued Antitrust Guidelines for the Licensing of Intellectual Property, drawing on the Agencies' extensive experience in case-by-case antitrust analysis of real-world markets involving intellectual property. These Guidelines explained that: "The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." *Id.* at § 2.2. This guidance remains in full force a decade later. Indeed, it was unmodified after full exploration in extensive hearings held in 2002 under the auspices of both agencies (involving input from 300 panelists over 24 days) regarding Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. The results of those hearings were reflected in a 2003 report in which it was reaffirmed that: "Patents *do not always or even frequently* confer monopoly power on their owners. Indeed, *most patents do not confer monopoly power on their holders*. . . ." FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 8-9 & n.55

(2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf (emphasis added and footnote omitted) ("this report uses the terms ['monopoly power' and 'market power'] interchangeably").

CONCLUSION

For the foregoing reasons, the *Loew's* presumption cannot and should not serve to uphold the judgment of the Court of Appeals below. While the matter at bar is a patent case, the Court should reverse the judgment below and make clear that its holding applies to copyrights and other forms of IP as well. "[I]t would seem quite anomalous to conclude that the presumption should no longer apply to patents, which historically have carried the strongest presumption of power, and not to conclude that it has been lifted from non-patent intellectual property as well." HOVENKAMP, JANIS & LEMLEY, *supra*, § 4.2e6.

Respectfully submitted.

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APPENDIX

Daniel G. Swanson and Julian W. Poon of Gibson, Dunn & Crutcher LLP represent the following *amici curiae*: the Motion Picture Association of America, Inc., the Association of American Publishers, the Business Software Alliance, the Entertainment Software Association, the Independent Film & Television Alliance, the National Football League, and the Recording Industry Association of America, Inc.

Daniel E. Robbins also represents the Motion Picture Association of America, Inc.

Victor S. Perlman represents the American Society of Media Photographers, Inc.